Supreme Court, U.S.
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No. 87-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

vs.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL K. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, Individually and in Their Official Capacities,
Respondents.

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF IN SUPPORT OF QUESTION ONE IN THE PETITION

Pursuant to Rule 22.5 of the Rules of the Supreme Court, petitioners supplement their brief so as to bring the Court's attention to an intervening decision of the Second Circuit in Narumanchi v. The Board of Trustees of the Connecticut State University, Michael J. Adanti, and Alan H. Leader, in Docket No. 87-7796, decided on June 20, 1988, Slip Opinion No. 1032 - August Term 1987. [Appendix L]. This opinion is hereafter referred to as Slip Opinion.

Petitioner Narumanchi is the only party in that case and is a party jointly with Mehta in the instant case seeking the Petition. The Appellees in Docket No. 87-7796 are all respondents in this Petition also, and thus it is incumbent on this Court to consider the Slip

Opinion for the purposes of deciding this Petition.

In the Slip Opinion written by Hon. Jon O. Newman, Circuit Judge, joined by Circuit Judges Van Graafeiland and Miner, the Second Circuit found the dismissal of Narumanchi's First Amendment claims to be error [Slip Opinion, at p. 4207], and reversed and remanded the case to the District Court for further proceedings.

In affirming the District Court's ruling in the instant case, the Second Circuit referred to Judge Dorsey's ruling in H-86-51(PCD) dated October 6, 1986, and found: "Appellants claim that the district judge never ruled on their first amendment claims.However, we find that in its opinion dated January 28, 1987, the district court incorporated its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51 (PCD)".[Appendix B]. By the Slip opinion,

H-86-51 is reversed by the same Circuit Court relating to the First Amendment claims. Since the ruling that was incorporated was in error, the ruling that incorporated it should also be found erroneous. In the Petition for Certiorari, Petitioners have previously made reference to the then pending appeal before the Second Circuit at page 4 and in Foot note 2 at page 39 of their Petition. The ruling dated October 6, 1986, now partially reversed was set out as Appendix F, pages 23A - 66A in the Petition filed on May 31, 1988.

The present Second Circuit's opinion further reinforces the need for this Court to intervene and summarily reverse Judge Dorsey's order so far as it pertained to the dismissal of the First Amendment claims.

The Petition for Certiorari should be granted for correcting the

inconsistent opinions rendered by different panels of the Second Circuit in relation to the same Constitutional issue and involving the same parties. The faith in the judicial system should be restored by having uniform decisions by lower courts.

The inconsistencies which this Court should note are as follows:

1).In Donohue v. Windsor Locks Bd. of Fire Com'rs, 834 F. 2d 54, (2d Cir. 1987), a panel consisting of Circuit Judges, Kaufman, Pierce and Miner, reversed Judge Dorsey's ruling dismissing First Amendment retaliation claims by Summary Judgment. This decision was rendered on November 25, 1987.

2). Then, a panel consisting of Chief Judge Wilfred Feinberg and Circuit Judges Oakes and Pratt, affirmed the dismissal of First Amendment retaliation claims in Mehta and Narumanchi v. The

Board of Trustees, et al., , the subject matter of this Petition. That order was issued on December 9, 1987. A rehearing was denied and a mandate was issued on March 9, 1988. [Appendix C].

3).Now, on June 20, 1988, a panel consisting of Circuit Judges Van Graafeiland, Newman, and Miner, again reversed Judge Dorsey's ruling relating to First Amendment retaliation claims. [Slip Opinion].

While Narumanchi may have his day in Court in regard to some of his First Amendment claims when the case is tried on remand, the joint Petitioner Mehta will be deprived of his day in court by the erratic decisions of the Second Circuit. Unless this Court intervenes, Judge Dorsey and other federal judges find no direction as to the appropriate handling of First Amendment claims.

The above arguments refer to the

granting of summary judgment in First Amendment cases and not necessarily with discovery. Petitioners' argument in Question one in the Petition is further strengthened by the fact that the error was compounded in this case by the grant of summary judgment even before discovery.

This Court, in Sure-Tan, Inc. v. NLRB, 1984, 467 U.S.883, 104 S. Ct. 2803, 81 L. Ed. 2d 732, considered the argument that the First Amendment protected an employer's acts in retaliating against alien employees by reporting them to the Immigration and Naturalization Service after they had voted for a union even though such argument was not raised before the Court of Appeals and the NLRB. The significance of First Amendment rights was thus properly noted by this Court in Sure-Tan and numerous other cases. The First Amendment issue in this

case is squarely before this court and petitioners will be deprived of their constitutional rights not only at the hands of the respondents as alleged in the Amended Complaint but also at the hands of the Judiciary unless the Petition is granted and Judge Dorsey's ruling summarily reversed.

The argument herein is fairly encompassed in the first question presented in the Petition. Since Mehta also alleged a violation of First Amendment rights, he should not be barred from obtaining relief merely because of a misreading of the Constitution by the lower courts. Petitioners respectfully pray that the Writ of Certiorari be issued.

PETITIONERS

New York, NY
June 30, 1988

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APPENDIX

APPENDIX L

RULING OF THE UNITED STATES

COURT OF APPEALS

(June 20, 1988)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1032 - August Term 1987

Argued: April 12, 1988

Decided: June 20, 1988

Docket No. 87-7796

RADHA R. M. NARUMANCHI

Plaintiff - Appellant

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITY, MICHAEL J. ADANTI, and ALAN H. LEADER,

Defendants - Appellees,

DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL L. BECKER, FRANK E. MUSK,

JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, individually and in their official capacities,

Defendants,

Before: VAN GRAAFEILAND, NEWMAN, and MINER, Circuit Judges.

Appeal from a judgment of the District Court for the District of Connecticut (Peter C. Dorsey, Judge) dismissing procedural due process and First Amendment claims in a suit by a professor against officials of a state university.

Affirmed as to dismissal of procedural due process claim; reversed and remanded as to dismissal of First Amendment claim.

Krishna M. Vempaty, New York, N.Y. (Howard R. Birnback, Sulkow, Birnback, Jasilli & Schleifer, New York, N.Y.; Altschuler, May & Stanek, Seymour, Conn., on the brief), for plaintiff-appellant.

Thomas P. Clifford, III, Asst. Atty. Gen., Hartford, Conn. (Joseph I. Lieberman, Atty. Gen. Robert W. Garvey, Asst. Atty. Gen., Hartford, Conn., on the brief), for defendants-appellees.

JON O. NEWMAN, Circuit Judge:

Radha Narumanchi, a tenured professor at the Southern Connecticut State University ("SCSU" or "the University") appeals from a judgment of the District Court for the District of Connecticut (Peter C. Dorsey, Judge) dismissing his claim that disciplinary actions taken against him by the University violated his rights under the First Amendment, the Due Process Clause of the Fourteenth Amendment, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec 2000e et seq. (1982). The Title VII claim was

resolved in favor of the University after a bench trial in a part of the judgment not challenged on appeal. Narumanchi contends that the District Court erred, however, in dismissing his constitutional claims on the ground that he had refused to avail himself of the grievance procedures established in the collective bargaining agreement between his union and his employer. We affirm that aspect of the judgment dismissing the due process claim but reverse the dismissal of Narumanchi's First Amendment claim.

Narumanchi is an American citizen of Asian Indian extraction and a tenured professor in the School of Business Economics at SCSU. His complaint alleges that the defendants-appellees have subjected him to disciplinary action on account both of his race and his vocal opposition to various policies and practices of the University. The

disciplinary action included a two-week suspension without pay, which the University contends was imposed because of Narumanchi's refusal to permit a formal classroom evaluation following complaints from students that his classes were conducted in an unprofessional manner. Narumanchi also complains of actions allegedly taken by the defendants to prevent him from participating in various departmental administrative functions and "reprimands" from University officials allegedly damaging to his professional reputation.

On August 13, 1985, the Chairperson of the Department of Accounting at SCSU informed Narumanchi that his classroom teaching would be evaluated in accordance with Article 4.13 of the Collective Bargaining Agreement (the "Agreement") between the University and the Connecticut State University Association of

American University Professors ("the Union"), the SCSU faculty's exclusive bargaining agent. However, Narumanchi refused to admit the faculty evaluation teams on a number of occasions, claiming that the evaluation procedures were in violation of the Agreement. On November 1, 1985, Narumanchi was warned by the Dean of the School of Business Economics, Alan H. Leader, that his actions constituted a serious breach of his responsibilities under the Agreement and that further refusals to cooperate would result in disciplinary measures. Dean Leader wrote to Narumanchi again on November 12 after yet another evaluation team had been refused entry to Narumanchi's classroom. This letter notified Narumanchi, pursuant to Article 15.3.2 of the Agreement, that the University intended to suspend him without pay for a period of two weeks as

a result of his conduct. The letter quoted from the Agreement, stating that Narumanchi "may contest said intent to suspend through the grievance system beginning at Step 3" by filing a formal grievance within five days. A Step 3 hearing is presided over by the President of SCSU and the President of the Union and is final and binding when both concur in the appropriate disposition of the grievance. The Step 3 hearing was initially scheduled for November 26, 1985, and then postponed at Narumanchi's request until December 3, 1985. Narumanchi filed the pending action in the interim, and he failed to appear at the December 3 hearing. His absence from the December 3 proceeding was deemed a waiver of his grievance, and Narumanchi's suspension was imposed soon thereafter.

On defendants' motion for summary judgment, the District Judge permitterd

Narumanchi's Title VII claim to proceed to trial but dismissed his claim under the First and Fourteenth Amendments in light of Narumanchi's failure to utilize the grievance procedures provided in the Collective Bargaining Agreement. Narumanchi contends on appeal that this disposition is contrary to the rule of Patsy v. Board of Regents, 457 U.S. 496 (1982), which held that a plaintiff bringing suit under 42 U.S.C. Sec 1983 is not required to exhaust state administrative remedies.

1. Due Process. Appellant's contention is without merit as it relates to the procedural due process claim because it misperceives the legal framework under which a claim is analyzed. The analysis proceeds in two steps. The threshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution. See Board of

Regents v. Roth, 408 U.S. 564 (1972). If a protected interest is identified, a court must then consider whether the government deprived the plaintiff of that interest without due process. The second step of the analysis thus asks what process was due to the plaintiff, and inquires whether that constitutional minimum was provided in the case under review. See Mathews v. Eldridge, 424 U.S. 319 (1976).

In the present case, the District Judge adhered to this framework. Judge Dorsey did not dismiss Narumanchi's due process claim as a threshold matter on "exhaustion of remedies" grounds. Rather, after properly determining that SCSU's decision to suspend Narumanchi without pay implicated a protected property interest, see Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Bailey v. Kirk, 777 F.2d 567

(10th Cir. 1985), the Judge found that the grievance procedures contained in the Agreement provided whatever process Narumanchi was due as a matter of federal law. Patsy is irrelevant to this holding. See Campo v. New York City Employees' Retirement System, 843 F.2d 96, 103 (2d Cir. 1988); Marino v. Ameruso, 837 F.2d 45, 47 (2d Cir. 1988); Lewis v. Hillsborough Transit Authority, 726 F.2d 668, 669-70 (11th Cir.) (per curiam) (denying petition for rehearing), cert. denied, 469 U.S. 822 (1984).

The conclusion should hardly be surprising that the limited procedural rights guaranteed under the circumstances of this case are satisfied by the pre-deprivation notice and hearing rights provided in the grievance procedures under the Agreement. See Costello v. Town of Fairfield, 811 F.2d 782, 786

(2d Cir. 1987) (Van Graafeiland, J., concurring) (finding post-deprivation arbitration of grievances under collective bargaining agreement satisfied due process); Lewis v. Hillsborough Transit Authority, 726 F.2d 664, 667 (11th Cir. 1983) (per curiam), reh'g denied, 726 F.2d 668 (11th Cir.), cert. denied, 469 U.S. 822 (1984); Jackson v. Temple University, 721 F.2d 931, 933 (3d Cir. 1983); Winston v. United States Postal Service, 585 F.2d 198, 209-10 (7th Cir. 1978). Narumanchi has not asserted any reasonable basis for finding the grievance procedures inadequate. His assertion of inevitable bias and partiality in a forum whose composition is specified by the terms of a collective bargaining agreement is unsupported. Narumanchi's failure to submit to the grievance procedures precluded consideration of the fairness of those proceedings

in practice. Cf. Parrett v. City of Connersville, 737 F.2d 690, 697 (7th Cir. 1984) (finding that union grievance machinery, though not "inherently inadequate", did not satisfy due process "as administered in the present case"), cert. dismissed, 469 U.S. 1145 (1985). Dismissal of appellant's due process claim was proper under the circumstances of this case.

2. First Amendment. The dismissal of appellant's First Amendment claim rests upon a different footing. The claim is based on Narumanchi's allegations that the disciplinary action taken against him was motivated in part by his vocal opposition to the reorganization of the SCSU School of Business Economics and to the renewal of Professor Martha F. O'Hara's employment at SCSU. The District Court initially considered the sufficiency of this claim under the test

set forth in Connick v. Myers, 461 U.S. 138 (1983), and found that Narumanchi had made an adequate showing that (a) his speech dealt with issues of "public concern", (b) on balance, it appeared that the speech did not compromise the efficient functioning of the University, and (c) it could be found that the speech was a substantial or motivating cause of the adverse action, see Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977). Judge Dorsey concluded that Narumanchi "has sufficiently pleaded a first amendment claim." Ruling of October 2, 1986, at 12. Nevertheless, the Judge dismissed the First Amendment claim as "premature," applying the same reasoning used to dismiss the due process claim discussed earlier.

Dismissal of the First Amendment claim was error. First Amendment rights, in

contrast to those rights protected by the procedural component of the Due Process Clause, are substantive in nature. As such, they may not be infringed regardless of the procedural "protection" accompanying the deprivation. "It is no defense to a claim of infringement of the liberties protected by the First Amendment that the procedure was fair, but it is a defense to a claim of deprivation of property, since such a deprivation is permitted by the due process clause provided there is no denial of due process." Parrett v. City of Connersville, supra, 737 F.2d at 697. Nor is it permissible, in light of Patsy v. Board of Regents, supra, to require initial recourse to available state proceedings, including union grievance proceedings, for the enforcement of First Amendment rights protectable in federal court pursuant to section 1983. See

Clark v. Yosemite Community College District, 785 F.2d 781, 790 (9th Cir. 1986); Hochman v. Board of Education, 534 F.2d 1094 (3rd Cir. 1976).

The judgment of the District Court dismissing the Fourteenth Amendment procedural due process claim is affirmed. Dismissal of the First Amendment claim is reversed, and the case is remanded for further proceedings.